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Why Califonria Shopping Centers Can't Protect Mickey Mouse from Union Handbilling: A Comment on Glendale Associates v. NLRB

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WHY CALIFORNIA SHOPPING CENTERS CAN'T PROTECT MICKEY MOUSE FROM UNION HANDBILLING: A COMMENT ON *GLENDALE ASSOCIATES V. NLRB*

I. INTRODUCTION

Hey Mouseketeers!

Before you shop in *the Disney store*, you should know what Disney is doing with your money:

Disney heaps millions of taxpayer dollars on CEO Michael Eisner . . . while exploiting workers in the U.S. and abroad.[1]

In *Glendale Associates v. NLRB* (*Glendale Associates II*),[2] the Ninth Circuit held that a shopping center could not prevent union handbillers from distributing flyers containing a mall tenant's name to mall patrons.[3] The shopping center had maintained a rule that prohibited certain groups from identifying a mall manager, owner, or tenant by name in handbills given to the mall's customers.[4] The court's decision is significant because it is the first time under California law that a court has determined that such a rule was unlawful. The court's reasoning was based in part on California Supreme Court precedent and in part on First Amendment jurisprudence.[5]

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1. Glendale Assocs., Ltd., 335 N.L.R.B. 27, 32 (2001) (emphasis added). For ease of reference, this case will be referred to as "*Glendale Associates I*" while the later Ninth Circuit case, *Glendale Associates v. NLRB*, 347 F. 3d 1145 (9th Cir. 2003), will be referred to as "*Glendale Associates II*."

2. 347 F.3d 1145 (9th Cir. 2003).

3. *Id.* at 1158.

4. Exempt from the rule, for example, were advertisements by mall tenants. *Id.* at 1156.

5. *Id.* at 1153–58.

The shopping center at issue threatened union handbillers with arrest for trespassing if they continued to handbill without removing a reference to "the Disney Store"[6] from their flyer. The Ninth Circuit noted that California courts had held that handbillers had a free speech right under the California Constitution to conduct expressive activity[7] on a shopping center's private property.[8] The Ninth Circuit further noted that the right to conduct expressive activity was not absolute, and could be subject to reasonable time, place, and manner limitations imposed by the shopping center.[9]

The Ninth Circuit analyzed the shopping center's rule through the lens of First Amendment jurisprudence.[10] Courts look to First Amendment jurisprudence to interpret the free speech provisions of the California Constitution when there is no California precedent on point.[11] Before *Glendale Associates II*, no California court had examined whether such a rule was a lawful time, place, and manner rule.[12]

The Ninth Circuit began by applying the same tests that are applicable to government entities under the First Amendment.[13] The court asked whether the restriction was a content-based or a content-neutral reasonable time, place, and manner restriction.[14] A content-based restriction is impermissible unless it passes a strict test, while courts grant a content-neutral restriction greater deference.[15] The court concluded that the rule was a content-based restriction.[16] The court found that the shopping center's rule did not meet the strict requirements to qualify as a *lawful* content-based restriction, and thus, the threat of arrest had violated the handbillers' rights.[17]

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6. *Id.* at 1149–50.
7. Expressive activity refers to the circulation of petitions and handbills that are not directly related to commercial purposes. *See, e.g.*, Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 902, 592 P.2d 341, 342, 153 Cal. Rptr. 854, 855 (1979).
8. *Glendale Assocs.*, 347 F.3d at 1154–55.
9. *Id.* at 1154.
10. *Id.* at 1149.
11. *Id.* at 1156–58.
12. *Id.* at 1156.
13. *Id.* at 1157.
14. *Id.* at 1155–57.
15. *Id.*
16. *Id.* at 1158.
17. *Id.*

This Comment will summarize the facts of *Glendale Associates II* and the Ninth Circuit's reasoning. It will then present four lines of analysis regarding the case. First, it will argue that the Ninth Circuit appropriately used the First Amendment test applicable to government entities within the shopping center context. Second, it will propose that the court should have relied on a prior California Supreme Court decision, *In re Lane*[18] to confirm its First Amendment analysis. Third, it will examine the concerns the Ninth Circuit may have had over the validity of that case as current precedent, and will conclude that the California Supreme Court's holding in *Lane* is still valid and bolsters the holding in *Glendale Associates II*. Finally, it will consider the implications of the Ninth Circuit's holding.

II. PROCEDURAL AND SUBSTANTIVE FACTS OF *GLENDALE ASSOCIATES II*

A. Background Facts

In June 1997, NABET-CWA Local 57 ("Local 57")[19] was one of five NABET-CWA labor union locals[20] involved in bargaining a Master Agreement with ABC, Inc.[21] The parties were negotiating a successor to the Master Agreement that had expired on March 31, 1997.[22] ABC, Inc. had proposed changes that would eliminate the

18. 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969).

19. NABET-CWA Local 57 is the abbreviation for the National Association of Broadcast Employees and Technicians, the Broadcast and Cable Workers Sector of the Communication Workers of America, Local 57. The author of this Comment was President of Local 57 from July 1994 to January 2004.

20. NABET-CWA Local 57 is a labor union local that represents television and radio engineers, newswriters, producers and plant services employees who work at the Los Angeles, California studios of ABC, Inc. The other four locals represent similar employees who either work in, or were assigned out of, the cities of New York, Chicago, Washington, D.C., and San Francisco. *See, e.g.*, NABET-CWA Local 57, *Who We Are*, *at* http://www.nabet57.com/latest/whoweare.html (last visited Dec. 30, 2003).

21. ABC, Inc is a wholly owned subsidiary of The Walt Disney Company, Inc. *See, e.g.*, NABET-CWA/ABC Master Agreement 1997–2003, Sideletter EM (on file with the author).

22. *Glendale Assocs.*, 347 F.3d at 1148.

employer's contribution to the employees' pension plan and reduce the number of jobs covered by the collective bargaining agreement.[23]

The employees represented by Local 57 continued to work after expiration of their Master Agreement while the parties negotiated a new collective bargaining agreement.[24] To increase public pressure on the employer's parent, Disney, the employees embarked on a public education campaign at Disney Stores.[25] The campaign relied on volunteer union members to educate the public by handbilling.[26] Local 57 hoped that through lawful persuasion, consumers would be turned away in solidarity with the union employees and show support by signing a postcard addressed to the CEO of Disney.[27]

Local 57's leadership determined that the best location for reaching the public would be in front of Disney Stores. The front entrance is generally an effective location from which to persuade the public because patrons are contemplating purchases as they are about to enter the store. One of the challenges the union faced in employing this strategy was that, in the greater Los Angeles area, most Disney Stores lease commercial retail space in large enclosed shopping malls or outdoor plazas. The interior and exterior walkways and parking lots that the public use to access the retailers are privately and separately owned, rather than being public property.

Initially, Local 57 members handbilled at the Glendale Galleria in front of the Disney store without permission of the mall's management.[28] While handbilling, they were approached by mall management, told that the mall maintained rules regulating handbilling on its premises, and offered an application and a set of rules.[29] Under California law, shopping center owners must give access to the public to conduct expressive activity, but are allowed to adopt time, place, and manner regulations.[30] Such rules are upheld as reasonable as long as they are narrowly drawn and promote

23. Copies of proposals are on file with the author.
24. *See Glendale Assocs.*, 347 F.3d at 1148-49.
25. *Id.*
26. *Id.*
27. A copy of the postcard is on file with the author.
28. The Glendale Galleria is located in Glendale, California.
29. Glendale Assocs., 355 N.L.R.B. 27, 27 (2001).
30. Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 911 (1979).

"specifically identified substantial interests."[31] In light of prior California appellate court opinions,[32] Local 57 decided to take a conservative approach and completed the application instead of challenging the application process since the union's goal was immediate: to get its members' message to mall patrons without the delays that a court battle over "reasonableness" might entail.

Local 57's officers completed the application to handbill near the Disney Store, and the Glendale Galleria granted them permission.[33] The handbilling was scheduled for June 7, 1997.[34] In spite of that permission, mall management threatened to arrest Local 57 President Gena Stinnett[35] and Local 57 member Neal Noorlag if they handbilled.[36] Their crime—the union's flyer named the Disney Store, a mall tenant.[37] One of the Galleria's rules prohibited certain groups from naming a Galleria manager, owner or tenant on handbills given to Galleria customers.[38] While employee disputes with a primary employer were exempt from the rule, the mall did not

31. H-CHH Assocs. v. Citizens for Representative Gov't, 193 Cal. App. 3d 1193, 1209, 238 Cal. Rptr. 841, 851 (1987). Already recognized substantial interests include "freedom from disruption of normal business operations and freedom from interference with customer convenience." *Id.* at 1208. This test is derived from the test applicable to government entities. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (explaining that time, place, and manner rules, as imposed by the government, are acceptable "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information'" (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

32. *See, e.g.*, Union of Needletrades v. Superior Court, 56 Cal. App. 4th 996, 65 Cal. Rptr. 2d 838 (1997) (holding that reasonable time, place, and manner rules may be enforced against union activity at shopping malls).

33. Glendale Assocs. v. NLRB, 347 F.3d 1145, 1149 (9th Cir. 2003).

34. *Glendale Assocs.*, 335 N.L.R.B at 27.

35. *Id.* Ms. Stinnett is the author of this Comment. It is an adage in Hollywood that "it doesn't matter what they say about you, as long as they spell your name right." Due to a typographical error, "Stinnett" is spelled "Stinett" in the administrative law judge's decision. *See id.* at 30.

36. While they were threatened with arrest by mall management, no police officer ever arrived to carry out the threat. An arrest does not have to be made for the threat to be actionable. *See id.*

37. *Id.*

38. *Glendale Assocs.*, 347 F.3d at 1149.

apply the exemption in this case, as the handbillers were not employees of the Disney Store.[39]

Additionally, Glendale Galleria rules required that all handbillers be identified on the application form.[40] Local 57 provided under protest the names of the handbillers.[41] Union leadership believed it was conceivable that the mall would turn the list over to the Disney Store, which in turn could provide it to ABC, Inc., the primary employer.[42] The union was concerned that the employees would be targeted by the employer as pro-union, and thus vulnerable to discrimination by the employer.[43] Local 57 filed a Labor Board charge against the Glendale Galleria owners and management over the threat of arrest and the requirement that handbillers be identified.[44]

Even though the parties had a dispute over the content of the handbill, the Glendale Galleria continued to allow Local 57 to

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39. *See id.*

40. *Id.*

41. *See id.* at 1150.

42. While it is true the handbillers were in a public place and could be observed by anyone in the mall, including ABC, Inc. management, the handbillers would also be able to see members of management who just "happened" to be at the mall observing them. If the mall "secretly" transmitted the list to ABC, Inc. management, and ABC, Inc. management unlawfully discriminated against the handbillers because of their union activity, the union would lack evidence that managers knew that the employees were union activists, a necessary element in proving discrimination. Further, managers of the primary employer could come to the mall *only if* they had a legitimate reason for doing so. Otherwise, they would be subject to an NLRB charge for surveillance of union activity. *See, e.g.*, Gainesville Mfg. Co., 271 N.L.R.B. 1186 (1984) (finding that the employer's overt and intended surveillance of union handbillers on public property was a violation of section 8(a)(1) of the National Labor Relations Act ("NLRA")).

43. For example, the employer could reassign to less desirable jobs employees who had demonstrated pro-union sympathies.

44. Glendale Assocs., N.L.R.B. Case No. 31-CA-22759 (June 1997) (charge against employer) (am. Sept. 1997). To avoid needless repetition, when this Comment refers to the Glendale Galleria, that reference is inclusive of the owners and management who qualified as employers under the NLRA. Glendale Orbach's Associates, one of the co-owners, was not an employer engaged in commerce within the meaning of section 2 of the NLRA, and was not subject to the NLRB's jurisdiction. Glendale Assocs., 335 N.L.R.B. 27, 33 (2001).

handbill on subsequent occasions.[45] During the five months that Local 57 sporadically handbilled at the Glendale Galleria, additional problems arose. Galleria security interfered with Local 57's handbillers by telling them "that they had to refrain from initiating any communication with the Galleria patrons," by requiring them to remove backpacks while handbilling, and by telling them that their signs had to be "professionally prepared."[46] Local 57 filed a second Labor Board charge over this interference with their members' protected union activity.[47]

B. Procedural History

The Labor Board issued a complaint against the owners and management of the Glendale Galleria, combining the two charges into one complaint.[48] As a result of settlement negotiations, the Glendale Galleria agreed to post a "NOTICE TO EMPLOYEES" that resolved some of the issues raised by the two Labor Board charges.[49] The Notice stated that the owners and management of Glendale Galleria promised not to "interfere with employees' right to handbill by telling them that they have to refrain from initiating any communication with our patrons . . . [,] by telling them to remove backpacks because such backpacks violate our dress code . . . [, and] by telling them that signs must be professionally prepared."[50]

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45. The handbill was ultimately changed by NABET-CWA to reference only "Disney," as it was also being used at other Disney-sponsored events.

46. Glendale Assocs., Order Consolidating Cases, N.L.R.B. No. 31-CA-22759 (June 1998) (consol. am. compl. & notice of hr'g).

47. Glendale Assocs., N.L.R.B. Case No. 31-CA-23189 (Jan. 1998) (charge against employer).

48. Glendale Assocs., Order Consolidating Cases, NL.R.B. No. 31-CA-22759 (June 1998) (consol. am. compl. & notice of hr'g).

49. Glendale Assocs., N.L.R.B. Case No. 31-CA-23189 (Nov. 1998) (settlement agreement). Settlement agreements do not set precedent. The agreement is offered here to demonstrate how the process works and to provide a complete background of the case.

50. *Id.*

As explained, *supra* note 31, reasonable time, place, and manner rules must be narrowly drawn. For example, it is highly probable that Glendale Galleria's restriction forbidding the initiation of communication with mall patrons would have been found unlawful had the matter gone to hearing. Courts have recognized that shopping centers do have a significant interest in promoting the smooth flow of customers through its walkways. *See* H-CHH Assocs. v. Citizens for Representative Gov't, 193 Cal. App. 3d 1193, 1218

The Glendale Galleria would not settle the original issues: (1) the rule forbidding the naming of a mall tenant in a handbill, and (2) the requirement that all handbillers be identified and listed on the mall's application form.[51] Those issues were adjudicated before an administrative law judge,[52] who found that the Glendale Galleria violated the handbillers rights because the rule forbidding the naming of a mall tenant was a content-based restriction, unlawful under both the First Amendment and section 7 of the N.L.R.A.[53] The judge recommended that the mall be ordered to expunge its rule prohibiting handbills "which identify by name the center owner, manager or any tenant of the center."[54] However, the judge did not agree that the mall rule requiring advance identification of handbillers was unlawful.[55] He recommended dismissing that challenge.[56] The Labor Board adopted the administrative law judge's recommendations, with some modifications, in *Glendale Associates*

(1987). However, handbillers can approach customers as long as they do not "impede or interfere" with the mall's customers. *Id.* at 1221. A rule that prohibits "approaching" mall patrons has been struck down as "overbroad, encompassing lawful, as well as unlawful, activity." *Id.*

51. *See* Motion of Counsel for the General Counsel to the Administrative Law Judge Requesting Withdrawal of Complaint, N.L.R.B. Case No. 31-CA-23189 (Feb. 18, 1999).

52. The case was heard and decided by Administrative Law Judge Michael D. Stevenson, whose ruling was adopted in a modified form by the Labor Board. Alice Garfield, General Counsel with the Labor Board, Region 31, prosecuted the case on the union's behalf.

53. Glendale Assocs., 335 N.L.R.B. 27, 36 (2001).

54. *Id.*

55. The Labor Board found that the rule promoted significant interests of the mall: (1) it reduced the risk of damage to the mall or injury to mall patrons, and (2) gave the mall information to assess the necessity of requiring a group to provide liability insurance. *Id.* at 35. These interests satisfied the second prong of the two-part test that evaluates the reasonableness of the rule. *See* discussion *supra* note 31. However, the Labor Board did not address the first prong of the test, whether the rule was "narrowly tailored." The union's position was that the rule was not narrowly tailored because it did not require that the center maintain the list in confidence. In spite of that deficiency, the Labor Board concluded that the rule was reasonable and that the Glendale Galleria was entitled to maintain the rule under state law. *But see* Union of Needletrades v. Superior Court, 56 Cal. App. 4th 996, 1018–20, (1997) (upholding a shopping center rule requiring the advance identification of union participants *after* the shopping center had agreed to treat the list as confidential).

56. *See Glendale Assocs.*, 335 N.L.R.B. at 36–37.

(Glendale Associates I).[57] The Glendale Galleria appealed to the Ninth Circuit the Labor Board's finding that it had violated the handbillers rights. The Ninth Circuit upheld the Labor Board's ruling.[58]

III. THE LABOR BOARD AND NINTH CIRCUIT'S REASONING IN *GLENDALE ASSOCIATES*

The Labor Board and Ninth Circuit both concluded that the Glendale Galleria's restriction against naming mall tenants in handbills was unlawful.[59] After determining as a threshold matter that state property law controlled the question of whether Local 57's handbillers had a right of access to the shopping center property, the Ninth Circuit agreed with the Labor Board that the Glendale Galleria was required to allow union activists access to conduct expressive activity.[60] While the Glendale Galleria could maintain reasonable time, place, and manner rules, those rules could not forbid expressive activity such as handbilling even if the Glendale Galleria believed the message could potentially hurt a mall tenant's business.[61] Such a rule would discriminate on the basis of content and be unlawful.[62] The Ninth Circuit affirmed the Labor Board's ruling, holding that Glendale Galleria's rule forbidding the naming of a mall tenant was an unlawful content-based restriction and the threat of arrest violated the handbiller's rights.[63]

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57. The Labor Board revised some details of the administrative law judge's recommended order and did not adopt his entire analysis. *Id.* at 27. However, those differences are not significant for the purposes of this Comment.

58. Glendale Assocs. v. NLRB, 347 F.3d 1145, 1151 (9th Cir. 2003). Local 57 did not appeal the ruling dismissing their challenge to the prior identification of handbillers requirement, and that matter was not placed before the Ninth Circuit.

59. The analysis of the Labor Board and the Ninth Circuit are presented together to prevent repetition and enhance clarity. For the most part, the Ninth Circuit agreed with the Labor Board but provided a greater depth of analysis.

60. *Glendale Assocs.*, 347 F.3d. at 1153, 1158.

61. *Id.* at 1154.

62. *Id.* at 1158.

63. *Id.*

A. State Property Law Controls Access for Protected Union Handbilling

As a starting point, both the Labor Board and the Ninth Circuit noted that it is unlawful for an employer to exclude from its premises employees[64] engaged in union activity protected under section 7 of the NLRA unless the employer possesses a state property right to exclude the union handbillers.[65] Section 7 provides in part that: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[66] Employee appeals to third parties asking for their support in an ongoing collective bargaining dispute between the employee and the primary employer—similar to the activity at issue here—have been afforded section 7 protection.[67]

The Glendale Galleria argued that under *Lechmere, Inc. v. National Labor Relations Board*,[68] the United States Supreme Court had recognized that the rights granted employees under the NLRA do not stop the employer from excluding union representatives from its property under certain circumstances.[69] In *Lechmere*, union organizers entered Lechmere's employee-used parking lot to distribute informational union literature to Lechmere's employees as part of an organizing campaign.[70] Lechmere personnel barred them from the premises, claiming that the Lechmere Shopping Plaza had a

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64. The employee does not have to be an employee of the mall. An employer can violate the NLRA rights of someone who is *not* an employee of the employer. If the employer qualifies under the NLRA as a "statutory employer," the employer may be found to have committed an unfair labor practice against employees *other* than its own. *See* Austin Co., 101 N.L.R.B. 1257, 1258–59 (1952). The owners and managers of the Glendale Galleria, except for Glendale Orbach's Associates, were statutory employers. Glendale Assocs., 335 N.L.R.B. 27, 33 (2001).

65. *Glendale Assocs.*, 347 F.3d at 1151–53; *Glendale Assocs.*, 335 N.L.R.B. at 28 . The phrase "protected activity" refers to those employee rights described in section 7 of the NLRA.

66. 29 U.S.C. § 157 (2000).

67. *See* Sierra Publishing Co. v. NLRB, 889 F.2d 210, 216–19 (9th Cir. 1989); *see also*, Kitty Clover, Inc., 103 N.L.R.B. 1665, 1687–88 (1953).

68. 502 U.S. 527 (1991).

69. *Glendale Assocs.*, 347 F.3d at 1151.

70. *See Lechmere*, 502 U.S. at 529.

policy that banned distribution of literature by non-employees.[71] The union filed an unfair labor practice charge against Lechmere for barring them from the premises, claiming that other channels of access were not reasonably available.[72] Prior NLRB opinions allowed union organizers access to private property under a balancing test that considered the availability of reasonably effective alternative means of exercising the section 7 rights at issue.[73]

The United States Supreme Court held that nonemployee union organizers must show that other access to employees is "infeasible" before any balancing of the section 7 right and the property owner's interest takes place.[74] The Court found no violation of section 7 existed based on the exclusion of union representatives, noting that the union had other available channels of communication, such as holding pro-union signs outside the employee parking lot.[75] The Court upheld the right of the shopping plaza to exclude the nonemployee union organizers from its premises.[76] However, the Court did not articulate the *basis* for its decision that the employer had the right to bar nonemployee union organizers.

In a subsequent case, the Supreme Court clarified its holding in *Lechmere*.[77] The employer's right to post its property against trespass by nonemployee union organizers was not a right granted by the NLRA, but rather was a right derived from the property law of the state where the "trespass" took place.[78] However, "while this right is not superseded by the NLRA, *nothing in the NLRA expressly protects it*."[79] In *Lechmere*, that right was provided by Connecticut law, which protected the shopping center's right to exclude others.[80]

Both the Labor Board and the Ninth Circuit concluded that *Lechmere* was inapplicable to the Glendale Galleria facts, as

71. *See id.* at 530.
72. *See id.* at 531.
73. Jean Country, 291 N.L.R.B. 11 (1988).
74. *See Lechmere*, 502 U.S. at 538.
75. *See id.* at 540.
76. *See id.* at 541.
77. Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994).
78. *See* Glendale Assocs. v. NLRB, 347 F.3d 1145, 1152 (reaffirming the Ninth Circuit's analysis in *NLRB v. Calkins*, 187 F.3d 1080 (9th Cir. 1999) holding that *Lechmere* was inapplicable in a similar case, based on *Thunder Basin*).
79. *Thunder Basin*, 510 U.S. at 217 n.21 (emphasis added).
80. *See Calkins*, 187 F.3d at 1088.

California law did not give the shopping center a right to exclude the handbillers.[81] Both tribunals applied a two-prong analytical approach developed by the Ninth Circuit.[82] Under that approach, the Ninth Circuit asks first whether the individual handbiller engaged in activities protected by section 7, and second, whether the person or entity attempting to exclude the handbillers has "a property interest under California law entitling it to exclude that activity."[83] These are distinct inquiries that look to section 7 of the NLRA to answer the first question, and state property law to answer the second question.[84] If state law provides no right to exclude, then *Lechmere does not* give the shopping center the right to exclude the handbillers. Instead, if section 7 protects the activity, the exclusion of the employees is an unfair labor practice.[85]

B. Consumer Boycott Handbilling Is Protected by Section 7 of NLRA

The Ninth Circuit and the Labor Board spent little ink deciding that the handbilling at issue was protected union activity under section 7.[86] Local 57 handbillers distributed a flyer that raised collective bargaining terms at issue between NABET-CWA and ABC, Inc. (e.g., pension contributions), advocated for better working conditions on behalf of other employees who made Disney products, and for the closure of a tax loophole benefiting Disney.[87] Thus, the handbill dealt in part with the primary dispute the employees had with ABC, Inc., but also urged a boycott and other actions targeted at the sister and parent company.[88]

The Labor Board determined that the Local 57 handbillers had stayed within the parameters of section 7:[89] "Whether the handbill is

81. *See Glendale Assocs.*, 347 F.3d at 1150, 1151–53.

82. *See id.* at 1153; Glendale Assocs., 335 N.L.R.B. 27, 34–36 (2001); *see also* Eastex, Inc. v. NLRB, 437 U.S. 556, 563 (1978); *Calkins*, 187 F.3d at 1088.

83. *Calkins*, 187 F.3d at 1088.

84. *See id.* at 1089.

85. *See id.*; *see also* O'Neil's Mkts, Inc., 318 N.L.R.B. 646 (1995); Bristol Farms, Inc., 311 N.L.R.B. 437 (1993).

86. *See Glendale Assocs.*, 347 F.3d at 1148.

87. For the complete text of the handbill, see *id.* at 1149 n.2.

88. *Id.*

89. Glendale Assocs., 335 N.L.R.B. 27, 27 n.5 (2001). The NABET-CWA members did not work for the Disney Store, which was one of the entities

considered a form of consumer information handbilling as to the Union's dispute with ABC, Inc., consumer boycott handbilling, or even a 'less-favored' form of secondary handbilling, it is clearly protected under Sec. 7 of the Act."[90] The Ninth Circuit articulated it slightly differently stating: "Section 7 protects Union members and representatives that engage in activities to pressure their employer during a labor dispute, even when picketing a sister company owned by the same parent company."[91] Having found that the activity was protected under section 7, both tribunals then looked to California state property law to determine whether the Glendale Galleria had a right to exclude the Local 57 handbillers.[92]

C. California State Property Law Cannot Be Used to Exclude Expressive Activity Handbillers from Shopping Center Property

To determine whether the shopping center had a California state property right to exclude the union handbillers, both the Labor Board and the Ninth Circuit looked to established case law.[93] The California Supreme Court had ruled in *Robins v. Pruneyard Shopping Center*[94] that "section 2[95] and 3[96] of article I of the California Constitution protect speech and petitioning, reasonably

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targeted in the handbill. Rather, they worked for ABC, Inc. (the primary employer), which is a wholly owned subsidiary of Disney Enterprises. The Disney Store, Inc. is also a wholly owned subsidiary of Disney Enterprises, Inc., making them "sister" companies. *Glendale Assocs.*, 347 F.3d at 1148.

90. *Glendale Assocs.*, 335 N.L.R.B. at 27 n.5 (citing Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568 (1988); *Oakland Mall*, 316 N.L.R.B. 1160, 1163 n.14 (1995), *enforced*, 74 F.3d 292 (D.C. Cir. 1996)).

91. *Glendale Assocs.*, 347 F.3d at 1153 (citing Sears, Roebuck & Co. v. San Diego County Council of Carpenters, 436 U.S. 180 (1978); NLRB v. Calkins, 187 F.3d 1080, 1086–87 (9th Cir. 1999)).

92. *See Glendale Assocs.*, 347 F.3d at 1153.

93. *See supra* Part III.A.

94. 23 Cal. 3d 899 (1979).

95. Article I, section 2 of the California Constitution reads: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2.

96. Article I, section 3 of the California Constitution reads: "The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good." CAL. CONST. art. I, § 3.

exercised, in shopping centers even when the centers are privately owned."[97] In *Pruneyard*, the California Supreme Court dealt with political petitioning on the private property of a large shopping center.[98] There, the court found that the California Constitution provided a broader free speech right than under the United States Constitution, trumping a shopping center's right to invoke trespass laws to exclude handbillers engaged in expressive activity.[99] The court upheld the right of political petitioning on private property, but made it subject to reasonable time, place, and manner regulations.[100]

D. Rules Regulating Handbill Content Violate Free Speech Guarantees of the California Constitution

1. Content-Based Rules Are Impermissible

a. Labor Board analysis of the content-based restriction

The Labor Board determined that the Glendale Galleria rule prohibiting handbills that named a tenant of the mall was a content-based restriction and unlawful under California law.[101] However, the Board did so without much analysis. The Board observed that "[a]s a practical matter, it appears that the purpose and effect of the rule, as applied here, was simply to shield the [Glendale Galleria's] tenants, such as the Disney Store, from being the subject of otherwise lawful handbilling."[102] The administrative law judge was equally terse in his analysis: "If found valid, said rule could render any handbilling meaningless," as recipients may not realize the connection between ABC, Inc., Disney, and the Disney Stores.[103] While both the Labor Board and the administrative law judge recognized the heart of the issue, the Ninth Circuit provided a deeper analysis of the problem.[104]

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97. *Pruneyard*, 23 Cal. 3d at 910.
98. *Id.* at 902.
99. *Id.* at 905–06.
100. *Id.* at 910–11.
101. Glendale Assocs., 335 N.L.R.B. 27, 28 (2001).
102. *Id.*
103. *Id.* at 36.
104. *See* Glendale Assocs. v. NLRB, 347 F.3d 1145 (9th Cir. 2003).

b. Ninth Circuit analysis of the content-based restriction

The Ninth Circuit recognized that in analyzing a state law question, they are "bound by the decisions of the state's highest court."[105] If that court has not "squarely addressed an issue," the Ninth Circuit must "'predict how the highest state court would decide the issue,'" by analyzing how California appellate courts have dealt with the issue, and by examining "'decisions from other jurisdictions, statutes, treaties and restatements for guidance.'"[106]

To determine whether a time, place, and manner rule adopted by a governmental entity is valid under California's constitution, the California Supreme Court has held that the analysis will vary with whether the rule is content-based or content-neutral.[107] California courts heavily borrow from Federal First Amendment jurisprudence in making the distinction between content-based and content-neutral rules.[108] Strict scrutiny is applied to content-based rules.[109] To pass the strict scrutiny test, the rule must employ the *least restrictive means* to further a *compelling interest.*[110]

The Ninth Circuit applied the government entity standard and concluded that the Glendale Galleria's rule was content-based, as it was concerned with the literal content of the flyer, prohibiting speech that ran counter to its interests, or the interests of its tenants.[111] This was evident because the Galleria had to review the flyer, and would allow the naming of a mall tenant if it was contained in a tenant's commercial literature or literature distributed by employees who had a primary labor dispute with a Galleria tenant.[112] Furthermore, the

105. *Id.* at 1154 (citing NLRB v. Calkins, 187 F.3d 1080, 1089 (9th Cir. 1999)).

106. *Id.* at 1154 (quoting *Calkins*, 187 F.3d at 1089).

107. *Id.* at 1155 (citing L. A. Alliance for Survival v. City of Los Angeles, 22 Cal. 4th 352, 364–65, 992 P.2d 334, 340–41, 93 Cal. Rptr. 2d 1, 7–9 (2000)). The Glendale Galleria is a very large indoor shopping mall, and the mall did not claim exemption from *Pruneyard. See id.* at 1148.

108. *See id.* at 1155 (citing Savage v. Trammell Crow Co., 223 Cal. App. 3d 1562, 273 Cal. Rptr. 302 (1991)). The court in *Savage v. Trammell Crow Co.* found shopping center rules that narrowly limit speech to "political expression" and ban religious speech violate the state constitutional principles enunciated in *Pruneyard. Savage*, 223 Cal. App. 3d at 1581.

109. *Glendale Assocs.*, 347 F.3d at 1155.

110. *Id.*

111. *Id.* at 1156.

112. *Id.*

Local 57 handbillers did not qualify under the mall's "*primary* labor dispute" test since they were not employees of the Disney store.[113] In essence, the rule allowed the Glendale Galleria to decide who could say negative things about a mall tenant.

Finding that the restriction on speech was content-based, however, was not dispositive. Content-based restrictions on speech pass the strict scrutiny test as long as they "employ[] the least restrictive means to further a *compelling interest*."[114] The Galleria argued that under prior case law, it had a compelling interest in restricting certain types of speech: the protection of businesses in the mall against disruption.[115] The Ninth Circuit did not agree.[116] Rather, the court observed that the Glendale Galleria's citations to prior case law were misplaced.[117] Those cases had held that protecting a mall business against disruption met the "substantial interest" prong of the less restrictive test applied to content-neutral rules, but did not qualify as a "compelling interest."[118]

The Ninth Circuit went on to note that the California Supreme Court had yet to rule on whether "protection against disruption of businesses" was a *compelling interest*.[119] Instead of resolving that issue, the Ninth Circuit used a different yardstick to measure the Glendale Galleria's rule.[120] The court recognized that both "California and federal courts have invalidated content-based rules as unconstitutional when rules contain exceptions, and those exceptions implicate the same interests that motivates the restriction on the regulated content."[121] In *Glendale Associates II*, the mall allowed naming a tenant when the handbill at issue promoted the tenant's interests, but prohibited it when the tenant was criticized by the general public or criticized by a labor union that did not have a primary dispute with the tenant.[122] The mall's own financial self-

113. *Id.*
114. *Id.* (emphasis added).
115. *Id.*
116. *Id.* at 1157.
117. *See id.*
118. *Id.*; *see also* discussion of content-neutral time, place, and manner rules, *supra* note 31.
119. *Glendale Assocs.*, 347 F.3d at 1156.
120. *Id.* at 1157–58.
121. *Id.* at 1157 (citations omitted).
122. *Id.*

interest motivated the exception to allow limited commercial speech. This was the same motive it had when it banned speech that attacked a mall tenant.

Further, courts have struck down regulations that are "'based on hostility—or favoritism—towards the underlying message expressed.'"[123] Here, the Glendale Galleria's rule was motivated by its own hostility towards handbills criticizing mall tenants. Thus, its rule forbidding the naming of a mall tenant violated the constitutional rights of the handbillers.[124]

The Ninth Circuit agreed with the Board and found the Glendale Galleria had violated section 8(a)(1) of the NLRA for threatening to arrest the Local 57 handbillers because the Galleria did not have a lawful reason to exclude them.[125] The Galleria's rule forbidding the mention of a Galleria tenant was a content-based rule that failed to survive strict scrutiny, and the union's refusal to follow it provided no justification for the threat of arrest.[126]

IV. AN ANALYSIS OF THE HOLDING IN *GLENDALE ASSOCIATES II*

This comment's analysis of *Glendale Associates II* will focus on four areas. First, it will argue that the Ninth Circuit's application of the governmental entity standard in the shopping center context was correct. Second, it will propose that the Ninth Circuit's decision could have been based on existing California precedent. It will apply that precedent to the facts in *Glendale Associates II* and argue that the precedent is still good law. Finally, it will examine the implications of the Ninth Circuit's holding.

A. The Ninth Circuit Applied the Proper Standard in Glendale Associates II

The Ninth Circuit observed that "privately-owned shopping centers are required to respect individual free speech rights on their

123. *Id.* at 1157–58 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992)).

124. *Id.* at 1154.

125. Section 8 of the NLRA states: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 USC § 157]. . . ." 29 U.S.C. § 158 (2000).

126. *See Glendale Assocs.*, 347 F.3d at 1155.

premises *to the same extent that government entities are bound to observe state and federal free speech rights.*"[127] However, the Ninth Circuit did not justify its decision to apply the governmental entity standard to shopping centers "to the same extent" as traditional public forums, although it did trace *Pruneyard*'s analysis and conclusion that a shopping center is a public forum.[128] Further, the California Supreme Court's opinion in *Pruneyard* did not explicitly state whether the standard applicable to government entities would apply within the shopping center context, or whether the test would be modified.[129] A brief examination of the language used by the *Pruneyard* court and prior precedent reveal that the California Supreme Court intended to apply the standard applicable to governmental entities to the private shopping center context.[130] Thus, the Ninth Circuit applied the proper standard in analyzing the Glendale Galleria's rule.

1. *Pruneyard* indirectly pointed to the governmental entity standard

The *Pruneyard* court noted that while the public could handbill at shopping centers, the handbillers would not have "free rein."[131] Shopping centers could adopt "time, place, and manner rules."[132] "Time, place, and manner" is the same formula that the court has used to describe the government's ability to regulate the conduct of activities protected by the First Amendment within public forums.[133] Thus, California appellate courts have concluded that *Pruneyard* adopted the same standard for shopping centers that is applicable to government entities.[134] The Ninth Circuit was in good company when it decided to apply First Amendment standards as well.

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127. *Id.* at 1154 (emphasis added). For example, content-based restrictions by governmental entities must employ the least restrictive means to further a compelling governmental interest. *See id.* at 1156.

128. *See id.* at 1154–55.

129. *See* Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 910–911 (1979).

130. *Glendale Assocs.*, 347 F.3d at 1154–1155.

131. *Pruneyard*, 23 Cal. 3d at 910.

132. *Id.*

133. *Savage v. Trammell Crow Co.*, 223 Cal. App. 3d 1562, 1572 (1990).

134. *Id.*; *see also* Westside Sane/Freeze v. Ernest W. Hahn, Inc., 224 Cal. App. 3d 546 (1990) (applying strict scrutiny and holding that a shopping center rule limiting expressive activity to only petitioning was an unconstitutional content-based restriction); H-CHH Assocs. v. Citizens for Representative

2. Shopping centers may prevent "physical" interference with business, consistent with prior application of the governmental entity standard

The Glendale Galleria argued that dissuading the public from shopping at the Disney Store disrupted its business, and it should be allowed to protect against interference with its business.[135] However, the *Pruneyard* court was not setting a new standard applicable to businesses when it granted businesses the right to establish "reasonable regulations . . . to assure that these [expressive] activities do not interfere with *normal business operations*."[136] Rather, the court was adapting the language of the government entity standards to the shopping center context, without changing the underlying standard.

Through a slightly circuitous route, the *Pruneyard* court defined what type of interference with "normal business operations" would be unacceptable.[137] The *Pruneyard* court cited to *Diamond v. Bland*.[138] *Diamond*, in turn, relied upon preceding cases, such as *In re Hoffman*.[139] *Hoffman* discussed the concept in some depth and drew heavily from First Amendment jurisprudence applicable to governmental entities to determine what sort of restrictions could be placed on handbilling.[140] Subsequent courts have characterized *Hoffman*'s discussion to mean that expressive activity, in the shopping mall context, cannot "interfere with the conduct of business or the use of the property, . . . impede the movement of customers or business tenants, . . . block access to facilities or businesses," nor can it be noisy, create a disturbance or "entail the harassment of uninterested patrons."[141]

When the *Hoffman* court forbade expressive activity that "interfered with the conduct of . . . business," it was not establishing

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Gov't, 193 Cal. App. 3d 1193, 1208 (1987) (applying "traditional" First Amendment time, place, and manner analysis to a shopping center's rules).

135. *Glendale Assocs.*, 347 F.3d at 1156.

136. *Pruneyard*, 23 Cal. 3d at 911 (emphasis added).

137. *Id.* at 903–11.

138. 3 Cal. 3d 653 (1970).

139. 67 Cal. 2d 845, (1967).

140. *Id.* at 849–54.

141. H-CHH Assocs. v. Citizens for Representative Gov't, 193 Cal. App. 3d 1193, 1208 (1987).

a new or unique standard applicable to businesses.[142] In its discussion, the court cited cases that considered the regulation of expressive activity that physically interfered with government functions, such as mass demonstrations in the driveway of a city jail.[143] The *Hoffman* court did not imply that peaceful persuasion that turned away customers would qualify as interference with the conduct of business.[144] A rule would qualify as a time, place, and manner rule if it addressed activities that physically interfered with the conduct of business, but not if the rule attempted to forbid lawful persuasion.[145]

By referring to *Hoffman*'s analysis and to "time, place, and manner restrictions," the *Pruneyard* court indicated that courts should apply the governmental entities standard to the shopping center context.[146] Protection against the disruption of business was not new or unique. Rather, it harkened back to the government's ability to stop physically disruptive conduct on public property, but not lawful persuasion.[147] The Ninth Circuit was correct in applying that standard to Glendale Galleria's content-based restriction.

B. Relevant California Supreme Court Precedent Provides an Alternative Basis for the Ninth Circuit's Decision

The Ninth Circuit appropriately concluded that under a First Amendment analysis, the Glendale Galleria could not enforce a rule prohibiting the naming of a mall tenant in a non-commercial handbill.[148] In reaching that decision, the court was obliged to apply prior decisions of the California Supreme Court in analyzing this state law issue.[149] The court recognized that the California Supreme Court had never squarely addressed a shopping center rule

142. *Hoffman*, 67 Cal. 2d at 852.

143. *Id.* at 852 (citing a series of cases, including Adderley v. Florida, 385 U.S. 39 (1966)).

144. *See id.* at 851–52.

145. *See id.* at 853.

146. Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 909–11 (1979).

147. *See Hoffman*, 67 Cal. 2d at 852.

148. Glendale Assocs. v. NLRB, 347 F.3d 1145, 1155–57 (9th Cir. 2003).

149. *Id.* at 1154 (citing *NLRB v. Calkins*, 187 F.3d 1080, 1089 (9th Cir. 1999)). Additionally, to the extent a California Supreme Court case is not exactly on point, the court's dicta is relevant to the inquiry. *Henkin v. Northrop Corp.*, 921 F.2d 864, 867 (9th Cir. 1990).

promulgated for the "protection against disruption of businesses." [150] However, the court did not apply a prior California Supreme Court decision that was based on facts similar to those in *Glendale Associates II*.

In re Lane[151] dealt with a retail store that used trespass laws to prevent union handbillers from distributing handbills calling for a boycott of the store on the store's private sidewalk.[152] While a time, place, and manner "rule" was not at issue in *Lane*, the case clearly articulated that a store cannot protect its business from disruption by using trespass laws to create a protective shield to prevent labor union criticism of the store.[153] Since the Ninth Circuit was having to foray into uncharted territory, *Lane* bolsters the court's logic, by providing a rationale approved by the California Supreme Court to support the Ninth Circuit's disapproval of the Glendale Galleria rule. The court's hesitancy to cite *Lane* may have been due, in part, to some controversy over the continuing validity of *Lane*.

This Section will demonstrate the relationship between *Lane* and *Glendale Associates II*, advocate that *Lane* is still good precedent, and conclude that the Ninth Circuit should have relied on the rationale in *Lane* to support its decision in *Glendale Associates II*.

1. *In re Lane* provides persuasive support for the Ninth Circuit's holding in *Glendale Associates II*

In *Lane*, the California Supreme Court held that a store could not use California trespass laws to prevent labor union representatives from distributing handbills from a privately owned sidewalk in front of the store's entrance when the handbills asked customers not to patronize the store.[154] The union was boycotting the grocery store because it advertised in newspapers published by

150. *Glendale Assocs.*, 347 F.3d at 1156.
151. 71 Cal. 2d 872 (1969).
152. *Id.* at 873–74.
153. *Id.* at 878. Without citing to *Lane*, the Labor Board used language similar to that contained in *Lane*. The Board observed that "[a]s a practical matter, it appears that the purpose and effect of the rule, as applied here, was simply to *shield* the [Glendale Galleria's] tenants, such as the Disney Store, from being the subject of otherwise lawful handbilling." Glendale Assocs., 335 N.L.R.B. 27, 28 (2001) (emphasis added).
154. *In re Lane*, 71 Cal. 2d at 873–74.

the employer with whom the union had a labor dispute.[155] The union's handbills specifically named the store.[156]

The facts of *Lane* were very simple. Donald Lane was an officer of a labor union.[157] Armed with handbills targeting Calico Market, Lane positioned himself on the sidewalk just outside the doorway of the store.[158] The sidewalk was the market's private property.[159] The owner threatened him with arrest if he did not leave.[160] When Lane refused to leave, the owner had him arrested.[161] Lane was convicted of violating trespass laws.[162]

The California Supreme Court granted a writ of habeas corpus, reversing the trespass conviction.[163] The court reasoned that "[i]f we were to hold the particular sidewalk area to be 'off limits' for the exercise of First Amendment rights in effect we would be saying that by erecting a '*cordon sanitaire*' around its store, Calico [Market] has succeeded in *immunizing itself from on-the-spot public criticism*."[164] The court's decision supported the right of labor union representatives to distribute handbills on certain types of private property even when the handbills "criticized" the entity that controlled the property.[165] It is implicit that in protecting the right to criticize the store through handbilling, the court was also protecting the right to name in the handbill the business being criticized.

Although *Lane* did not involve a store that had adopted reasonable time, place, and manner rules, it would be inconsistent for a court to allow a store to adopt a rule that gutted the holding in *Lane*. If a store could maintain a rule prohibiting the naming of the store in any handbills distributed on premises, the store would be creating the very "*cordon sanitaire*" that the California Supreme Court found unconstitutional.

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155. *Id.*
156. *Id.*
157. *Id.* at 873.
158. *Id.* at 873–74.
159. *Id.*
160. *Id.* at 874.
161. *Id.*
162. *Id.*
163. *Id.* at 872, 879.
164. *Id.* at 876 (emphasis added).
165. *Id.* at 876–77.

The store at issue in *Lane* was a stand-alone store that leased the entire store building and had the right of control over the private walkway in front of the store.[166] While in *Glendale Associates II* the rules were maintained by the owner and management of the mall, rather than the Disney Store, this fact does not alter *Lane*'s applicability. The Glendale Galleria argued before the Ninth Circuit that "they have a substantial interest in ensuring that neither their, nor their tenants', normal business operations are disrupted."[167] The Glendale Galleria went on to argue that "if they did not prohibit non-commercial literature that discloses a tenant's name, it would affect their tenant's investment in Petitioners' property because it would discourage the public from patronizing the named tenants."[168] Thus, the Glendale Galleria was acting on behalf of the Disney Store's interests by protecting the Disney Store's investment in its location at the Glendale Galleria. As the rules were maintained for the Disney Store's benefit, it does not matter that it was the store's agent—the Glendale Galleria—rather than the Disney Store itself that maintained the rule. Further, the Glendale Galleria was attempting to shield the Disney Store—to create a *cordon sanitaire* free of criticism—in order to promote its own business interests. *Lane* is squarely on point.

2. *Lane* remains good law in California

a. California courts may rely on prior California precedent that granted the public free speech rights on private property, even though the precedent was based on First Amendment jurisprudence

The status of *Lane* as precedent is not without controversy. *Lane* was decided before *Pruneyard*, and was based on a First Amendment case that was overturned in 1972.[169] Additionally, some California appellate courts have been hesitant to apply *Lane* outside

166. *Id.* at 873.
167. Glendale Assocs. v. NLRB, 347 F.3d 1145, 1153 (9th Cir. 2003).
168. *Id.* at 1156.
169. *See* Hudgens v. NLRB, 424 U.S. 507 (1976). *Lane* relied on Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). The Supreme Court in *Hudgens* stated that *Logan Valley* was overruled by the Court's decision in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). *Hudgens*, 424 U.S. at 518.

the labor union context.[170] However, a review of California Supreme Court cases demonstrates that *Lane* continues to hold value as binding precedent in California.

At the time *Lane* was decided, the United States Supreme Court had interpreted the First Amendment to the United States Constitution as protecting "peaceful picketing or handbilling 'carried on in a location open generally to the public,'" such as a typical suburban shopping center.[171] Based on that Supreme Court precedent, the California Supreme Court applied a First Amendment analysis to the facts at issue in *Lane*.[172] The *Lane* court found that the union handbillers had a First Amendment right to distribute their handbills on the store's private sidewalk.[173] Subsequently, the United States Supreme Court changed its position and held that the First Amendment did not provide the public with a free speech right on the property of privately owned shopping centers.[174]

In spite of its origin under now-overturned First Amendment jurisprudence, *Lane* remains good law for analyzing free speech rights under California's constitution. The *Pruneyard* court looked, in part, to *Lane* when it concluded that free speech rights under California's constitution provided greater protection than the First Amendment and protected expressive activity conducted on the private property of shopping centers.[175] The *Pruneyard* court recognized that although federal law took a "divergent course," it did not "diminish [*Lane*'s] usefulness as precedent."[176]

The *Pruneyard* court also affirmed *Lane*'s vitality in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*:[177] "Our earlier decisions in *Schwartz-Torrance* and *Lane—rulings which have not been overruled or eroded in later cases*—established the legality of union picketing on private

170. *See* cases cited *infra* note 200.

171. *In re Lane*, 71 Cal. 2d at 874–75 (quoting *Amalgamated Food Employees*, 391 U.S. at 313).

172. *Id.* at 876–77.

173. *Id.* at 874–78.

174. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); *see also Hudgens*, 424 U.S. at 518–19.

175. Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 908–10 (1979).

176. *Id.* at 908.

177. 25 Cal. 3d 317, 326–31 (1979).

sidewalks outside a store as a matter of state labor law."[178] However, at least one court has questioned whether *Sears* and *Lane* are still valid precedent under California law.[179] In part, those concerns are based on the fact that *Sears* was a plurality decision, and that the concurring justice did not rely upon *Lane* in joining the plurality.[180] Through a close look at Justice Newman's concurrence in *Sears*, and his decision in *Pruneyard*, we will see that *Lane* was ratified by both *Sears* and *Pruneyard*.

b. Justice Newman's concurrence did not undermine the Sears plurality's position on Lane

In *Sears*, the California Supreme Court, by a plurality decision, held that California's Moscone Act[181] prevented courts from issuing injunctions against peaceful union picketing[182] on private property outside a retail store.[183] The court overturned a preliminary injunction that had granted Sears the right to exclude the union picketers from the sidewalks in front of its store.[184]

In construing the Moscone Act, the three-justice plurality opinion found an ambiguity in the reach of subdivision (b) of the Act.[185] The plurality believed that resolving the ambiguity was necessary in order to determine whether the Act extended to peaceful union activity on private property.[186] To resolve the question, the plurality relied upon language in subdivision (a) of the Act. The relevant part stated: "the provisions of subdivision (b) of this section

178. *Id.* at 328.
179. Waremart Foods v. NLRB, 354 F.3d 870 (D.C. Cir. 2004).
180. *Id.* 872–73.
181. CAL. CIV. PROC. CODE § 527.3 (West 1979 & Supp. 2004).
182. The court did not indicate whether the signs mentioned the Sears store by name. However, it is such an accepted practice for picket signs to name the business against which the picketing is directed, that it was probably not worthy of note by the court.
183. *Sears*, 25 Cal. 3d. at 332–33.
184. *Id.*
185. Section (b)(2) of the Act "appears to declare 'peaceful picketing' to be legal, and thus not subject to injunction, without regard to the location of the picketing . . . however [(b)(1)] declares picketing 'not involving fraud, violence or breach of the peace' legal only if it occurs in 'any public street or any place where any person or persons may lawfully be.'" *Id.* at 324–25. The plurality set about to resolve this perceived conflict within the statute.
186. *Id.*

shall be strictly construed in accordance with existing law governing labor disputes with the purpose of avoiding any unnecessary judicial interference in labor disputes."[187] From this language the plurality reasoned that the legislature intended to protect "*all* union activity which, under prior California decisions, has been declared to be '*lawful activity*.'"[188] The opinion then proceeded to recite a series of relevant prior decisions by the California Supreme Court, including *Lane*, concluding that those cases "established the legality of union picketing on private sidewalks outside a store as a matter of state labor law."[189]

Justice Newman wrote an extremely short concurring opinion. His entire concurrence stated:

> I agree that the injunction order should be reversed, and I concur in nearly all of Justice Tobriner's reasoning.[190] He detects in the Moscone Act, however, certain ambiguities that to me do not seem to be confounding; and, unlike him, I do not believe that "the Legislature . . . intended the courts to continue to follow [all] principles of California labor law extant at the time of the enactment of section 527.3." (Maj. opn., *ante*, at p. 330.)[191]

Looking at the language Justice Newman used, one can conclude that the true majority[192] held that peaceful picketing on private property outside a retail store was protected from court injunction under the Moscone Act. Justice Newman concurred "in nearly all" of the plurality's reasoning.[193] Justice Newman found the Moscone Act unambiguous and did not need to resort to the prior extant principles of California labor law.[194] Thus, the plurality's basic holding—that peaceful picketing on private property outside a retail store was protected from court injunction under the Moscone Act—was affirmed by a majority of the justices. However, in disagreeing with the plurality, Justice Newman modified a sentence

187. CAL. CIV. PROC. CODE § 527.3 (West 1979 & Supp. 2004).
188. *Sears*, 25 Cal. 3d at 323 (first emphasis added).
189. *Id.* at 328.
190. Justice Tobriner wrote the plurality opinion. *Id.* at 320.
191. *Id.* at 333 (Newman, J., concurring) (quoting *id.* at 330).
192. The plurality plus Justice Newman.
193. *Sears*, 25 Cal. 3d at 333 (Newman, J., concurring).
194. *Id.* (Newman, J., concurring).

he quoted from the plurality opinion. He wrote that he did not believe "the Legislature . . . intended the courts to continue to follow [all] principles of California labor law extant at the time of the enactment of section 527.3."[195] By adding the word "all," it is apparent that Justice Newman was indicating his reservation that there may be prior labor law principles that the legislature did not intend for the courts to follow, leaving it open to a case by case analysis.

The brevity of Justice Newman's concurrence led one court to believe that Justice Newman did not approve of *Lane* as representing valid California law.[196] Since *Lane* was one of the cases cited by the plurality to support its analysis of extant principles of California labor law, Justice Newman's disagreement with the plurality's position created an ambiguity as to whether Justice Newman also disagreed with the plurality's approval of *Lane*.

This ambiguity is easily resolved by turning to the California Supreme Court's decision in *Pruneyard*. Justice Newman wrote the majority opinion in *Pruneyard*, which approved of *Lane* as useful precedent.[197] Justice Newman's prior approval of *Lane* indicates that he was not discounting *Lane* when he expressed his concern in *Sears* that the legislature did not intend for the courts to follow *all* prior labor law principles.[198] The California Supreme Court clearly announced that *Lane* is good precedent.

c. *Disagreement over the scope of* Lane *does not alter its value as precedent*

The California Supreme Court has issued no decision that undermines *Lane*.[199] Some California appellate courts, however,

195. *Id.* (Newman, J., concurring).

196. Waremart Foods v. NLRB, 354 F.3d 870, 872–73 (D.C. Cir. 2004).

197. Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 908–09.

198. *Sears*, 25 Cal. 3d at 333 (Newman, J., concurring).

199. The most recent California Supreme Court opinion to mention *Lane* was *Golden Gateway Center v. Golden Gateway Tenants Ass'n*, 26 Cal. 4th 1013, 29 P.3d 797, 111 Cal. Rptr. 2d 336 (2001). At issue was whether a free speech right existed in the interior halls of a private apartment complex. By a plurality decision, the court held that such a right did not exist. However, both the concurring opinion and the dissenting opinion (joined by the two other dissenting justices) cited *Lane* without questioning its validity or distinguishing it as a union activity case. *Id.* at 1038 (George, C.J., concurring); *id.* at 1052 (Werdegar, J., dissenting). The concurring opinion collectively referred to

have questioned whether *Pruneyard*'s citation to *Lane* altered it from a First Amendment case to California free speech case.[200] Of concern to the courts is whether the private sidewalk of a stand-alone grocery store—the type of facility at issue in *Lane*—was a public forum under *Pruneyard*.[201] The lower courts that have distinguished *Lane* have done so on the basis that it is applicable only to union activity cases or to cases in which the store itself is the target of the dispute.[202]

It is not necessary to resolve that issue in order to conclude that *Lane* remains good law for the proposition at issue in *Glendale Associates II*. There is no dispute over *Lane*'s holding that when private property becomes a public forum, the property owner cannot use California trespass laws to prevent peaceful criticism of the retail establishment in question. Even if *Lane* is narrowly read as applying only to union activity cases, *Lane* remains directly on point in *Glendale Associates I and II*, supporting the Ninth Circuit's conclusion that the Glendale Galleria unlawfully used the threat of

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Lane and other cases in concluding "the acts of distributing unsolicited pamphlets, picketing, and soliciting signatures or funds traditionally are performed in places open to the general public—that is, in places sometimes referred to as public forums." *Id.* at 1039 (George, C.J., dissenting). The dissenting opinion viewed the case as supporting the "'paramount and preferred place' that free speech enjoys in the hierarchy of rights in this state." *Id.* at 1052 (Werdegarm J., dissenting) (quoting *In re* Lane, 71 Cal. 2d 872, 878 (1969)). Those citations could be viewed as a four-three split concluding that the private sidewalk of the grocery store at issue in *Lane* was a public forum for purposes of expressive activity.

200. *See* Albertson's, Inc. v. Young, 107 Cal. App. 4th 106, 122–23, 131 Cal. Rptr. 2d 721, 734–35 (2003) (third appellate district disagreeing that *Pruneyard* altered the First Amendment rationale of *Lane*, concluding that when "the expressive activity [is] specifically related to the business use of the property [it tips] the balance in favor of expressive access"); Costco Cos. v. Gallant, 96 Cal. App. 4th 740, 755 n.1, 117 Cal. Rptr. 2d 344, 355 n.1 (2002) (fourth appellate district finding no public forum on private property of a stand-alone store, citing *Lane* as good law but distinguishing it as applying to labor union activity only); Trader Joe's Co. v. Progressive Campaigns, Inc., 73 Cal. App. 4th 425, 434–36, 86 Cal. Rptr. 2d 442, 449–50 (1999) (first appellate district refusing to apply *Lane* to petitioning unrelated to the stand-alone store at issue; finding no state constitutional free speech rights on private property of stand-alone stores and distinguishing *Lane* as based on state labor law).

201. *See supra* note 200.

202. *See id.*

arrest under California trespass laws against union representatives who targeted a Galleria retail establishment in their handbills.

C. *The Implications of* Glendale Associates II

The Ninth Circuit's holding in *Glendale Associates II* will have an impact at both the state and federal level. Even though it is not binding on California courts,[203] it is significant for California courts for two reasons. First, *Glendale Associates II* represented the first time that a court decided under California state law whether a rule was lawful that forbade handbillers from identifying a mall tenant by name. A prior California appellate court decision had noted in dicta that such a rule might not survive scrutiny, but the issue had not been preserved on appeal in that case.[204] Second, California courts can look to lower federal courts for persuasive authority.[205] The Ninth Circuit's analysis of Glendale Galleria's unlawful content-based rule is well articulated and very convincing. The California courts can adopt the Ninth Circuit's analysis when they are confronted with a same or similar issue.

Glendale Associates II will have the most impact within the labor relations context at the federal level. This case started out as an unfair labor practice charge filed with the National Labor Relations Board. The Labor Board oversees employee-employer labor relations and administers the NLRA.

Opinions of the Labor Board set precedent within the context of employee-employer disputes that are covered by the NLRA.[206] The Labor Board takes the position that administrative law judges who hear Labor Board cases must follow Labor Board opinions until the view is reversed by the Labor Board or the United States Supreme

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203. *See, e.g.*, Operating Eng'rs & Participating Employees Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund v. Weiss Bros. Constr. Co., 221 Cal. App. 3d 867, 879 n.11, 270 Cal. Rptr. 786, 793 n.11 (1990) (noting that California appellate courts are not bound by Ninth Circuit opinions).

204. Union of Needletrades v. Superior Court, 56 Cal. App. 4th 996, 1020–21 (1997).

205. 9 B.E. WITKIN & WITKIN LEGAL INST., CALIFORNIA PROCEDURE ch. 13, § 942 (1997 & Supp. 2003).

206. *See* 29 U.S.C. 160 (2000) (empowering the NLRB to prevent unfair labor practices, take evidence and issue orders); *see also* Iowa Beef Packers, 144 N.L.R.B. 615 (1963).

Court.[207] Federal circuit court decisions that differ from the Labor Board decisions are not followed by administrative law judges.[208] However, no restriction stops administrative law judges in the future from considering the analysis of a federal circuit court that supports a Labor Board holding.[209] Thus, *Glendale Associates I* will control how subsequent Labor Board counsel and administrative law judges approach the issues raised in the case, but the Ninth Circuit's reasoning provides additional support for the Labor Board's original decision.

This is good news for labor unions in California. If a labor union has a dispute with a shopping center tenant—whether it is a primary or secondary dispute—and the shopping center qualifies as a public forum, the center cannot forbid handbills that criticize the tenant by name.

The application of the governmental entity standard to shopping centers does not mean that malls must tolerate any and all speech. Rather, California appellate courts have already observed that "'fighting words,' obscenities, grisly or gruesome displays or highly inflammatory slogans likely to provoke a disturbance . . . could be prohibited."[210] Under *Glendale Associates I* and *II*, a shopping center's right to ban that type of speech is not altered.

V. CONCLUSION

As our culture has changed, fewer businesses are directly fronted by public sidewalks. Retail stores have taken refuge behind large parking lots or within huge shopping complexes. Thus, the average citizen spends very little time today walking on public property. If our free speech rights are to have any meaning for the individual citizen or small nonprofit groups with limited resources to spend on mass advertising, expressive activity must follow as the sidewalk changes from public to private property.

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207. *See, e.g.*, Iowa Beef Packers, Inc., 144 N.L.R.B. at 616 (holding that the uniform and orderly administration of the NLRA requires that Labor Board precedent take priority over federal circuit court holdings).

208. *See id.*

209. *See* 2 NAT'L LAB. REL. ACT: L. & PRAC. 2d (MB) § 15.08 (Dec. 2003) (noting that judicial opinions are treated as persuasive authority by administrative law judges).

210. H-CHH Assocs. v. Citizens for Representative Gov't, 193 Cal. App. 3d 1193, 1216 (1987).

The good news for shopping centers is that those free speech rights are not without limits. The property owner has the right to establish reasonable time, place, and manner limits that "are narrowly drawn and limited to the end of promoting specifically identified substantial interests."[211] However, content-based regulations that attempt to shield a particular business from the sword of expressive activity are not and should not be tolerated by the courts.

The Ninth Circuit properly decided that the Glendale Galleria rule was unlawful. The court correctly applied the governmental entity standard by conducting a First Amendment analysis of the rule. Using First Amendment jurisprudence, the rule was content-based and failed the test of strict scrutiny.

The Ninth Circuit should have utilized prior California Supreme Court precedent, *In re Lane*, to support its decision, as the Ninth Circuit was dealing with a previously undecided issue under California law. *Lane*'s holding—that a store could not create a "*cordon sanitaire*" to prevent union criticism—cut to the heart of what transpired in *Glendale Associates II*. Further, *Lane* continues to be valid precedent based on proclamations of the California Supreme Court in *Pruneyard* and *Sears*. Subsequent appellate decisions have recognized its validity in the labor union context that was at issue in *Glendale Associates II*.

Glendale Associates I and *II* have important implications for labor unions. Labor unions are fighting to win fair pay and working conditions for the employees the unions represent. One of the more effective tools that labor unions have in that fight is the ability to call for a consumer boycott of businesses that are unfair to workers. No longer can a shopping center in California forbid a union from handbilling on its property when targeting a center tenant—by name—with a boycott. In essence, the Ninth Circuit's holding expands the scope of *Lane* in the labor union context by preventing agents or landlords of a store from protecting the store from public criticism.

And what happened to our Local 57 handbillers in their fight against the mouse? As in any negotiation, they gained some ground and they lost some ground. However, ABC/Disney ultimately

211. *Id.* at 1209.

relented on its zero percent retirement contribution, and the parties settled on an employer contribution of three percent of base wages. Apparently, the message the handbillers sent was heard.

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[*] J.D., 2004, Loyola Law School; B.A., Special Major—Radio-Television Production and Engineering, California State University Long Beach, 1979. I dedicate this Comment in memory of my parents, Harry and Geneva Stinnett, who taught me to abhor injustice and instilled in me a strong work ethic. I would like to thank the editors and staff of the *Loyola of Los Angeles Law Review* for their editorial advice and tireless assistance in bringing this Comment to print, especially to Kirsten Miller for all of her time, effort, and insight. I would also like to thank Ralph M. Phillips, Esq., for his inspiration, knowledge, and encouragement in developing this Comment. I owe a special thank you to my husband, Eric J. Fleetwood, for his love, support, understanding, encouragement, patience, and weekend lunch delivery service, which have made it possible for me to continue working full-time while returning to school to pursue a second career.